

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



Application No. 15822 of F Street Real Estate Company, pursuant to 11 DCMR 3107.2, for a variance from the use provisions (Subsection 1702.4) to allow a department store to convert to another use - office, retail and service, on all floors of a vacant nine-story building in a DD/C-4 District at premises 1401 F Street, N.W. (Square 224, Lot 824).

HEARING DATES: June 16 and June 23, 1993  
DECISION DATE: July 7, 1993

SUMMARY OF EVIDENCE OF RECORD:

1. The subject property is located at the northwest corner of the intersection of 14th and F Streets, N.W. and is known as premises 1401 F Street, N.W. It is zoned DD/C-4.

2. The property contains 28,230 square feet of land area, with frontage of approximately 221 feet on F Street and 145 feet on 14th Street.

3. The property is improved with a building containing nine floors plus a mezzanine above grade, three cellar levels below grade and two additional levels of mechanical space above the ninth floor. The building was originally constructed in 1929, and an addition was originally constructed in 1946 on the west end of the F Street frontage. The total gross floor area of the building is 249,212 square feet, excluding the cellar and penthouse, for a total floor area ratio of 8.83.

4. The last recorded certificate of occupancy for the building (No. B107055, dated March 31, 1978) was issued for a department store. At the time that the certificate of occupancy was issued, the Zoning Regulations did not define a department store.

5. The building is currently vacant. It was last used as the flagship store of Julius Garfinckel & Company (Garfinckel's) and was used for that purpose from the time of its construction until the time that Garfinckel's went into bankruptcy and ceased retail operations in August 1990.

6. The C-4 District permits a broad range of commercial uses as a matter of right, including retail, service and office uses. For this site, C-4 permits a maximum height of 130 feet and a maximum floor area ratio of 10.0.

7. The Downtown Development ("DD") District Overlay includes the subject site in the Downtown Shopping District subarea. A building in this square, which is subject to the DD requirements, must provide a minimum of the equivalent of 2.0 FAR of floor area devoted to preferred retail, service, arts and entertainment uses as listed in Section 1710 and 1711 of the DD District regulations. In addition, Subsection 1702.4 of the DD District regulations provides that an "existing" department store shall not be converted to another use unless such conversion has been reviewed and approved by the Board of Zoning Adjustment pursuant to Subsection 3107.2 of the Zoning Regulations.

8. The property is located at the western end of the retail core portion of the Downtown area. The area in general is characterized by a mix of commercial uses, including office buildings with ground floor retail, hotels, and other buildings having a substantial retail component. The remainder of Square 224 is occupied by the Metropolitan Square development, which fronts on all four of the streets surrounding the square, has pedestrian access from all four streets to an atrium in the center of the building and which has vehicular access to the underground garage from both F and G Streets. To the north across G Street are the Commercial National Bank Building, the Bond Building and the Washington Building, all office buildings with ground floor retail. To the south across F Street are the Willard Hotel and Willard office building, including the Willard Collection retail shops, and the Washington Hotel. To the southeast across 14th and F Streets are the National Press Club Building and the National Place development. National Place includes the J.W. Marriott Hotel, the Shops at National Place (which also occupies space in the National Press Club Building), the National Theater and two office wings. Across 14th Street to the east, the square is improved with relatively new office buildings with ground floor retail at 1331 F Street, 1310 G Street and 607 14th Street, older office buildings at 1317, 1319 and 1333 F Street, four and five-story commercial buildings on both F and G Streets and a parking lot on the 13th Street frontage.

9. The subject application proposes to convert the existing building to a mixed-use, retail and office building. The applicant proposes to provide a floor area equivalent to a minimum of 2.0 FAR, at least 56,460 gross square feet, devoted to preferred retail and service uses. The floor area to be devoted to retail will include the ground floor and the first cellar, mezzanine and/or second floor. The total area on those four levels is approximately 73,000 square feet, from which a minimum of 56,460 square feet would be devoted to retail use. The remainder of the building would be used for office space and underground parking. The parking, as proposed, would consist of approximately 120 spaces, with access through the garage of Metropolitan Square, the development which adjoins the property to the north and west.

10. By letter dated March 23, 1993, the Assistant City Administrator for Economic Development advised the applicant that a variance from the provisions of Section 1702.4 of the Zoning Regulations would be necessary to allow for a change from the department store use at the subject premises. Under Section 1702.4 of the Zoning Regulations an existing department store shall not be converted, in whole or in part, to another use, nor be replaced by other uses occupying a new building on the same lot unless such conversion or replacement has been reviewed and approved by the Board pursuant to Section 3107.2 of the Zoning Regulations. The applicant has filed a concurrent appeal (BZA No. 15823) of the decision of the Deputy Mayor for Economic Development and the Zoning Administrator that approval from the BZA is required to devote the building to the uses proposed in this application. The hearing and consideration of that appeal has been deferred pending disposition of this application.

11. Until the applicability of the Downtown Development District, the subject property could have been used for any use permitted in the C-4 District, which would have allowed as a matter of right the combination of retail, service, arts and office uses the applicant proposes for the building. At the time the applicant acquired the building, in July of 1988, the property was not limited to use as a department store. The SHOP regulations, which were the predecessor regulations to the Downtown Development District, were not adopted until March 13, 1989, and did not become final and effective until publication in the D.C. Register on March 31, 1989. The Notice of Public Hearing for the Zoning Commission's consideration of the SHOP Regulations was published in the D.C. Register on May 20, 1988. However, the Regulations as proposed in the Notice of Public Hearing did not contain a requirement that an existing department store could not be converted to any other use without Board of Zoning Adjustment approval. Subsection 1701.5 of the advertised SHOP regulations permitted substitution of a broad list of existing uses with any other use on the list as a matter of right and further allowed conversion to office use by special exception. The publication of the Notice of Proposed Rulemaking in the D.C. Register on February 3, 1989, contained the provision requiring BZA approval prior to conversion of a department store for the first time.

12. The applicant's senior vice president, described the background of the applicant's ownership of the property. The applicant purchased the subject property in July 1988 for \$38 million, acquiring the property after a London developer did not settle on a contract which it had with the previous owner of the property. The applicant assumed the rights under the previous contract, including a lease with Garfinckel's department store, which would have yielded the owner annual rent equivalent to a 9 percent return on its investment. That rent was scheduled to begin after a two-year rent free period. The applicant's purchase

of the property occurred prior to the proposed February 1989 publication of the Notice of Proposed Rulemaking which first required BZA approval for conversion of a department store to any other use.

13. The applicant's representative testified that the management of Garfinckel's department store approached the owner in 1989 with a proposal to reduce the amount of space used by the store to the first four floors, mezzanine and basements and turn back the top five floors to the owner to be converted to office space. This was intended to improve the store's weakening financial condition. In return for the opportunity to use the top floors for office space, the owner was to reduce the store's annual rent from \$4,250,000 to \$2,850,000. In addition, the owner agreed to reimburse the store for renovation work in the selling area up to a total of \$3 million and to accelerate the asbestos abatement program for the building at a cost of \$1,500,000.

14. The owner and the department store filed Application No. 15283 with the Board of Zoning Adjustment for relief as a special exception from the SHOP District Zoning Regulations, pursuant to Subsections 1701.5 and 1706 of those Regulations. The Board of Zoning Adjustment granted the application by its order, dated April 19, 1990, **SUBJECT** to the following **CONDITIONS**:

- a. Office use shall be permitted on floors 5-9 and the ground (first) floor office lobby and office elevators (located on the far western side of the building off F Street, N.W.) and consistent with Exhibit Nos. 9 and 22 of the record. Office use shall also be permitted in tandem with department store use in Common Areas. Common Areas are to include loading docks, freight elevators, fire stairwells and like areas. Further, office use shall enjoy, in tandem with department store use, use of Building Operations Areas. Building Operations Areas shall include floors 10-11 and those portions of the basement now dedicated and required for the operation and maintenance of both office use and department store use areas (boiler rooms, storage tanks areas, etc.).
- b. Department store use shall have exclusive use of all areas where office use is not permitted, including floors 2-4, the ground (first) floor not including the area to be used for the office lobby and office elevators, and those portions of the basement floors which are not Building Operations Areas. Department store use shall have use of the department store use shall enjoy, in tandem with permitted office use, the Building Operations Areas.

- c. The applicant shall promptly enter into a new lease with Garfinckel's Department Store with terms consistent with those described in Exhibit No. 23A (Exhibit H) of the record.
- d. The applicant shall reimburse Garfinckel's Department Store up to \$3,000,000 for the stated purpose of upgrading the department store area on floors 1-4.

As conditioned, the Board's approval was specific to the previous department store use and did not allow either general retail use or department store use of the premises by another tenant.

15. The applicant's representative testified that the department store was unable to continue its operations because of its overriding financial difficulties. The Garfinckel's department store chain filed for bankruptcy on June 21, 1990. The active retail use of the premises ended on August 25, 1990, and all activity in the building ceased on December 21, 1990, when the last offices of the store vacated the building.

16. The applicant's representative testified that because the conditions of BZA Order No. 15823 were specific to the use by Garfinckel's Department Store, the applicant was unable to proceed with the proposed mixed-use development approved by the Board. In October 1990, in an effort to develop the site in compliance with the Zoning Regulations, the Senior Vice-President of the owner wrote to 27 department store operators, which comprised all the known department store operators in the United States, except one. The letters indicated that the building was available for lease, described the premises and its general location, but did not indicate any prior condition as to terms, rent, or other criteria which might apply to the department store use. The applicant received no positive responses to those letters. Only six replies were received and none of them indicated any interest in leasing the building. The applicant further submitted a letter from a real estate representative for J.C. Penney, indicating the difficulties with the building and the economics which led Penney's to conclude that it was not interested in the building.

17. The applicant's representative testified that the applicant had been contacted through Garfinckel's management in 1990 indicating that the May Company, the parent of Lord & Taylor, had an interest in exploring renting of the space that had been reserved for Garfinckel's under the BZA Order. The owner discussed that potential with representatives of the May Company for several months, with the May Company suggesting a starting rent of \$150,000 per year but willing to consider some higher rent, but no percentage rent based on sales. The starting rent amounted to approximately \$1.50 per square foot of selling area. Further negotiations

with the May Company resulted in a proposed annual rent of \$200,000 plus an unnamed percentage rent to begin in the third year. With the owner still responsible for the real estate taxes, the owner would not have received enough rent from the May Company to fully cover the pro rata share of real estate taxes.

18. The applicant's representative testified that the owner continued to make known in the retail community and among real estate brokers that the building was available for lease as a department store. Retail brokers had discussions with the owner about potential tenants for the building, including both national and foreign department store operators from Japan, France and England. Notwithstanding active interest by some of the chains to locate stores in other cities in the United States, none of the potential tenants was willing or interested in using all or part of the subject building, as is now required under the Zoning Regulations.

19. The applicant's representative testified that in early 1991, at the request of the Mayor, the owner and representatives of the May Company, along with representatives of the D.C. Office of Business and Economic Development, entered into further negotiations to see if a reasonable lease could be achieved, satisfactory to both the owner and the May Company, for use of the premises by Lord & Taylor. The owner agreed to reopen negotiations with the May Company because the Mayor indicated that she would keep an open mind as to whether department store use of the premises was still required and because she had agreed that those negotiations would be accomplished within one month.

20. The applicant's representative testified that after eight months of negotiations, which included proposed tax rebate payments by the city to the owner in order to help underwrite the cost of the department store, the owner and the May Company were unable to reach agreement as to a lease which would have been satisfactory to both parties. The best lease proposal received from the May Company would have yielded an uneconomical return to the owner and would have represented a long-term substantial loss to the owner.

21. The applicant's architect testified that the subject property was unique based on the following:

- a. The building was constructed in 1929 and has been used for all its active occupancy for a single retail user. There is no other building of this age and of this size in the vicinity which is affected by the same combination of conditions.

- b. The existing floor-to-floor heights greatly exceed the height which would be constructed for a typical commercial building today and which exists in the buildings in the immediate vicinity. The first floor has a height in excess of 20 feet and the second through ninth floors have heights ranging from 15 feet to 11 feet. Because of this configuration, the FAR of the building is limited to 8.83.
- c. The building was designated as a historic landmark by the Historic Preservation Review Board in Case No. 87-17, by decision dated February 17, 1988 and, therefore, is subject to review under the local historic preservation law for any exterior modifications. The combination of ceiling heights and landmark status make it unlikely that the site can achieve the maximum 10.0 FAR permitted by the underlying DD/C-4 District or undergo any major exterior modifications to the structure.
- d. The small size of only 28,230 square feet for the subject site is substantially less than the lot sizes of the two existing department stores in Downtown. Hecht's, located on G Street between 12th and 13th Streets, occupies a lot of 62,046 square feet, and Woodward & Lothrop, in the block bounded by F, G, 10th and 11 Streets, has a lot size of 50,281 square feet.
- e. The physical needs and desires of department stores have changed since the subject building was constructed in 1929. These changes include a need for a larger floor plate than the subject building provides, better vertical connection between floors, better level-to-level visibility, and direct connection to Metrorail, especially in urban areas.

22. Based on analysis of the market and options for the subject building, the applicant's economic consultant testified that the economics of department store use are such that a department store is generally unable to pay more than three percent of its gross revenue in real estate related costs. The applicant's economic consultant determined that, based on estimated sales and assuming that a department store could be found that would be interested in the property, the most a department store user could pay for rent and real estate taxes would be between \$5.60 and \$5.80 per square-foot. Assuming that real estate taxes would consume approximately \$4.15 per square foot, based on the current assessment plus estimated renovation costs, the rent available to the owner from a department store would be approximately \$1.45 to \$1.65 per square-foot. This rent to the owner would result in an average yield, for the ten-year period from 1993 to the year 2002, of less than one percent. That rate of return is not a reasonable

return on the investment, which included the \$38 million purchase price plus more than \$6 million in renovation costs necessary to restore the building for use as a department store. It further does not take into account additional expenses which the owner would incur over the length of the lease, including insurance, exterior maintenance, real estate taxes, and other related expenses.

23. The applicant's economic consultant testified that the use of the property as a department store on the lower levels with office use above would not yield a sufficient rate of return to make such an arrangement economically feasible. The office space provided under this scenario would by its nature be Class B or Class C space, and could not command the kind of rents otherwise expected from Class A space. The cost to renovate the building for the dual use, as related to the potential rents to be achieved, results in a return to the owner of approximately three to four percent. That rate of return is insufficient to make the project financeable, given the risks inherent in the proposal.

24. The applicant's economic consultant testified that, because of the physical configuration of the building and the market and economic consequences of potential department store use of the building, there is no demonstrated demand among department store users for the Garfinckel building, even at the minimum space requirement of 90,000 square feet, much less for the entire building which includes approximately 280,000 square feet of rental area. Based on market conditions, prospects for attracting a department store tenant will not improve at any time in the foreseeable future. Given that there is no reasonable likelihood of finding a department store to occupy all or a portion of the building, the applicant would be unable to make use of the subject premises and would be deprived of reasonable use of the property in the absence of approval from the Board.

25. The applicant's economic consultant testified that, in addition to restoring and revitalizing the Garfinckel building and providing a modest return to the owner, the current proposal would generate long-term economic benefits to the City, including \$3.1 million in annual tax revenue and nearly 1,200 jobs. Of those 1,200 jobs, based on Census and other data, it is expected that approximately 400 jobs would go to District residents.

26. The applicant presented a witness who had formerly been employed by Garfinckel's. The applicant's witness started as a sales person in 1960 and became president of the store from 1981 until the store was sold to the Raleigh group. The applicant's witness testified that Garfinckel's operated as a specialty store with special emphasis on women's apparel, accessories and related merchandizing as contrasted with a typical department store use which would include housewares, furniture, appliances, and



electronics, and other similar items. The applicant's witness indicated that Garfinckel's had determined that 90,000 square feet of space in the F Street store and in other branch stores was too much space, was not economical, and that stores should be smaller, in the range of 50,000 to 60,000 square feet, as was accomplished in the Garfinckel's stores in Annapolis Mall and Fairfax and also was of the opinion that it would not be realistic on an economic basis to rent a store for the entire building or even 90,000 square feet which would be the first five floors above grade. The applicant's witness recommended that approximately 56,000 square feet on three floors would be the amount of space for a specialty store and was of the opinion that a single upscale specialty retailer which carries a full line of merchandise would serve as an anchor-type store in this location bringing excitement and character to the building.

27. The applicant's expert witness in retail leasing and marketing described the retail core as in need of revitalization and was of the opinion that the difficulty in securing a department store includes the fact that markets are strong in suburban areas, where stores are a part of full-scale malls. Smaller stores in a full-scale mall, in effect, subsidize department stores. Department stores, in considering the downtown area of the District of Columbia, are willing to consider locations with only minimal economic terms because of the perceived risks. The witness also noted that the size of the floorplate of 1401 F Street would not meet modern and changing needs of department stores as they compete with each other. Therefore, he concluded that the minimum of 56,460 square feet of retail space would be appropriately occupied by specialty-type retailers who could serve the purpose intended for department stores by attracting patrons and buyers to the area. The configuration of the space would be best suited for a single anchor-type retailer, but could also be occupied by two or three anchor-type retailers. More than three anchor-type retailers would be extremely difficult. The witness stressed that there was no plan to divide the building into small shops. The witness also described his efforts to market the property on behalf of the owner.

28. The applicant's retail consultant cited the urgent need to revitalize the Downtown retail core through quality retail. The witness noted that it is easier for major specialty stores to locate in Downtown areas than it is for new department stores. The market for retail will be generated from three primary consumer sources: 1) close-in residents of the District; 2) District, Federal and private employees from nearby offices and embassies; and, 3) tourists and visitors to the retail shopping district, the surrounding museums, hotels, colleges and universities. The witness described the loss of retail business in the District of Columbia and the increase of larger stores in regional shopping centers such as Tyson's Corner, the Galleria, Pentagon City and

Fair Oaks. She also noted the many department store chains that have closed or filed bankruptcy proceedings under Chapter 11, including Macy's, Bloomingdale's, Ames, Bonwit Teller, B. Altman, Gimbel's and Bamburgers. The witness noted that smaller specialty stores occupying 20,000 to 50,000 square feet have a significant advantage over department stores since they can be flexible in meeting changing markets. Department stores, on the other hand, maintain a large diverse stock for mass merchandising and cannot make adjustments as quickly as specialty stores can. The witness concluded that the Garfinckel's building is obsolete in its restricted use as a department store. The only reasonable use she recommended was a better priced speciality retail use that would provide the quality and customer services needed to draw business in the area.

29. The applicant indicated that it was not possible to offer a specific potential tenant for the Board's consideration because the applicant lacked the ability to approach potential tenants and commit the use of the space prior to receiving the Board's approval. The applicant further indicated that there is a substantial reluctance to locate stores in Downtown Washington because of negative perceptions regarding the retail market Downtown.

30. The applicant has entered into a Memorandum of Understanding, dated June 8, 1993, with the Executive Branch of the District of Columbia Government which is binding upon both the District and the applicant. That Memorandum of Understanding commits the applicant to work with the Office of the Deputy Mayor for Economic Development to find the right kind of specialty, anchor-type retailer or retailers to occupy the building. The applicant has agreed to meet on a regular basis with the Executive Branch; to place primary emphasis on marketing for apparel and accessories store-type tenants; to use its best efforts to put retail on all or part of the second floor; and, to review with the Deputy Mayor for Economic Development any proposed tenant which expresses interest and which is seriously considered as a potential occupant of the space, in order to determine whether that tenant is consistent with the goals which the applicant and the District had agreed to in the Memorandum of Understanding.

31. The applicant's architect testified that the retail appearance of the building will be maintained and enhanced by retaining the first floor for use as retail space, with the exception of an office entrance, now expected to be from 14th Street, and by retaining and reinstituting use of the existing display windows. Since the building is a historic landmark, any changes to the exterior of the building will be subject to review by the Historic Preservation Review Board under the processes of D.C. Law 2-144.

32. The applicant testified that, in its existing vacant and unused condition, the building causes a substantial negative impact on the area. The absence of activity in the building creates "dead" space along two major street frontages in the retail core. The integrity of the zone plan would be preserved by restoring the building to active mixed-use with a substantial retail "attractor" component. The applicant's proposal would result in a significant retail occupancy of the building. The applicant would meet the minimum requirements specified in the DD District for retail use for a lot in this square. The proposed retail use would be located on at least three levels and probably four, thereby meeting the goal of the Downtown Development District to provide for multi-level retailing in the retail core area. The proposed retail uses would be high quality, destination-type retail, complimenting other existing retail uses in the vicinity. In addition, the goal of the regulations which underpin the requirement to maintain existing department stores would be met by approval of a retail component consistent with the description in the Memorandum of Understanding between the applicant and the Executive Branch.

33. At its public hearing of June 16, 1993, the Board waived its seven-day filing requirement to accept the report of the Office of Planning (OP) which was received six days prior to the public hearing. By memorandum dated June 10, 1993, the OP recommended conditional approval of the application. The OP was of the opinion that the applicant had met the requisite burden of proof for the granting of use variance relief. The OP was of the opinion that the conditions inherent in the subject property itself including the property's small lot size, the buildings relatively small floorplate, and the applicant's inability to secure a department store tenant combine to create an undue hardship on the applicant in its ability to use the existing building as a department store. The OP was further of the opinion that the requested zoning relief could be granted without substantial detriment to the public good, noting that the existing vacant condition of the building has had a negative impact on Downtown's image and that the applicant's proposal would reestablish a substantial retail presence in the building which would again contribute to the retail vitality of the immediate area and the retail core. The OP recommended that approval of the application be conditioned as follows:

- a. That the building contain a minimum of the equivalent of 2.0 FAR devoted to retail, service, arts and entertainment uses located on at least three levels of the building, including the first floor and other adjacent levels as may be required to meet the minimum floor area; and

- b. Before executing a final agreement with a proposed tenant, the Applicant shall consult with the Deputy Mayor for Economic Development concerning the nature of the proposed occupancy and the goal to provide a mixed-use building with a major anchor-retail component that will compliment and support other retail businesses in the Downtown retail core.

34. By letter dated June 16, 1993, the Deputy Mayor for Economic Development supported the granting of the application. The Deputy Mayor was of the opinion that the subject premises represents a key location at the western end of the Downtown Shopping District, and supported the proposal to lease to an anchor store or a mix of major retail users in order to return a major retail component to the currently vacant site, thereby bringing retail traffic back to the area and eliminating the blighting effect caused by the structure's vacant condition.

The Deputy Mayor was further of the opinion that the applicant has engaged in attempts to secure a department store tenant and has made a reasonable effort to negotiate economical lease terms to secure such a tenant. Based on the economic analysis of the feasibility of establishing a department store in the building and the implications of converting the building to mixed-use prepared by the applicant, as well as the counsel of affected retailers and individuals, the Deputy Mayor concluded that finding a department store tenant under mutually beneficial economic lease terms in the foreseeable future would be unlikely. The Deputy Mayor was of the opinion that continued vacancy of the subject premises adversely impacts the surrounding area, creating real financial and opportunity losses for the District.

35. By memorandum dated May 15, 1993, the Department of Public Works (DPW), offered no objection to the granting of the application. The DPW noted that the existing building does not provide on-site parking spaces and, further, that on-site parking spaces are not required under the current Zoning Regulations because the building has been designated a historic landmark. However, the DPW indicated that transportation problems related to the proposed conversion are not anticipated as the site is located within the Downtown core and is served by the Metrorail system, as well as numerous Metrobus routes.

36. By memorandum dated April 21, 1993, the D.C. Fire Chief indicated that it has no objection to the granting of the application, based on its review of the zoning request. The Fire Chief noted, however, that fire and life safety features required by city codes such as fire alarms, sprinkler systems, standpipe systems, exits, fire rated separations, fire extinguishers, etc. would be examined during the plan review process as part of the building permit application review.

37. By letter dated April 16, 1993, the Metropolitan Police Department (MPD) offered no opposition to the application. Based on its review, the MPD was of the opinion that the proposal would not affect the public safety in the immediate area nor generate an increase in the level of police services now being provided.

38. By letter dated June 8, 1993, Advisory Neighborhood Commission (ANC) 2F, the ANC within which the subject property is located, recommended that the application be denied. The ANC noted the following issues and concerns:

- a. The ANC was not satisfied that the owner had made a good faith effort to seek out suitable retail tenants for the space.
- b. The ANC was of the opinion that since Lord and Taylor was potentially interested in renting the space, the applicant could have accepted that offer which would have provided some income to the owner, rather than no income at all in its present empty condition.
- c. The ANC was uncomfortable with recommending approval of an application which did not address the location of the retail space in the building, entrances and exits, possible alterations to the store and the identity of potential tenants.
- d. The ANC stated that it wanted to send a message indicating a positive outlook to a more specific application and stated its belief that it would be extremely important for the owner to seek an "anchor" store to occupy the space. The ANC noted that an anchor store need not be a department store, stating that department stores may be an anachronism in today's market.
- e. The ANC recommended that a larger amount of space in the building be devoted to retail use, suggesting that the prior BZA approval, which required in excess of 100,000 square feet of retail space, would be more preferable to the community than the 56,000 square feet proposed in the subject application.

39. Advisory Neighborhood Commission 2A, the adjacent ANC to the west, by representative at the public hearing and by resolution dated June 10, 1993, opposed the application. The ANC noted the following issues and concerns:

- a. The ANC strongly supports the concept of a vibrant core as part of a living Downtown.
- b. The site has had a long history as the important western anchor of the retail area of F Street.
- c. Significant efforts are being made to maintain and expand the retail area of Downtown.
- d. Previous approval has been given for conversion of five floors from retail to office use, leaving only four floors for retail.
- e. A major retail presence on that corner would attract potential shoppers who would also be passing and patronizing other small stores in that area.
- f. The need for a reduction in retail to 2.0 FAR has not been demonstrated, in view of the necessity and desirability of the site as the western anchor to the F Street retail area.

40. The record contains a number of letters in support of the application from the owners of adjoining properties, including Metropolitan Square, the Willard Hotel, the Washington Hotel, the National Press Club, the operator of The Shops at National Place and the Westory Building; from the owners and operators of retail businesses in the vicinity, including retailers located in Metropolitan Square, in the Willard Collection and other buildings on 14th, F and G Streets in the vicinity; from Councilmember Jack Evans; and the Single Member District Commissioner from ANC-2F02. Two individual business owners, the representative of the National Press Club, and a commissioner of ANC 2A, testified at the hearing in support of the application.

41. The letters and testimony in support generally noted the negative effects that result from the vacant condition of the building; supported prompt action to restore active use to the building; indicated the economic benefits to the city and the area which would occur from restoration of an anchor-type retail presence in the building; and, confirmed the proposition that the applicant would be unlikely to find a department store tenant to occupy the building.

42. The record contains a number of letters and a petition in opposition to the granting of the application. Representatives of the Downtown Cluster of Congregations, the Citizens Planning Coalition, the Resident Council of Thomas House, and a downtown

retail shoe store testified at the public hearing in opposition to the case. The issues and concerns of the opposition are generally summarized as follows:

- a. A department store at the subject site is critical to the success of retail downtown; to attracting tourists in the Old Downtown; and to maintaining smaller retail uses.
- b. The efforts described by the applicant belie the type of major marketing effort needed to attract a department store tenant.
- c. A department store would provide a high percentage of jobs to District residents and increase tax revenues.
- d. The applicant failed to take advantage of a bona fide offer by the May Company to lease the premises for department store use.
- e. The BZA should require the applicant to provide more than 100,000 square feet of space devoted to retail uses, consistent with the approval previously granted to the applicant by the BZA for the reconfigured Garfinckel's store. The remainder of the building could be converted to office use.

43. The Downtown Cluster of Congregations presented an expert witness in land use/urban planning. The witness testified that the property is not subject to extraordinary conditions; the applicant is not suffering any "exceptional and undue hardship;" and, granting the applicant relief would cause a detriment to the public good and impair the intent, purpose and integrity of the zone plan. With regard to the purportedly exceptional conditions affecting the property, the witness testified as follows:

- a. The fact that the building was constructed and used by a single retail user, which happened to have been a department store, is a reason why a department store would be a natural use of the site, not a detriment.
- b. The existing high ceilings are more appropriate for a retail environment than an office use.
- c. Any exterior alterations must be approved by the HPRB because the property is a designated landmark, therefore, it may not be possible for the applicant to provide additional entrances on the first floor to serve both office and retail uses on the site.

- d. The lot size of 28,230 square feet is typical of other parcels in the Downtown and is not exceptional.
- e. The limitations imposed on this site by the Downtown Development District are not exceptional and apply to other downtown property, including the sites of Woodward & Lothrop and Hecht's.
- f. The Board's previous ruling in its Order No. 15283 does not establish evidence of the existence of an exceptional condition of the subject site and the special exception relief approved by that order did not require such a finding.
- g. The applicant had an opportunity to make reasonable use of the premises for a permitted department store use and chose not to accept that opportunity. The Board is not bound to provide an applicant with the greatest possible return on the property, only to ensure that a reasonable use of the premises is available.
- h. The applicant created its own hardship by paying too much for the property knowing, or having been in the position to know, that the property was restricted to department store use at the time it purchased the property.
- i. Anchor stores do not serve the same purpose as a department store. Further, the retail use proposed by the applicant does not meet the definition of the Zoning Regulations for an anchor store.
- j. The BZA should not consider the short-term economic consequences to the owner and deviate from the long-term principles enunciated in the Downtown plan as set forth in the Downtown Development District Regulations.

**FINDINGS OF FACT:**

1. The Board finds that the applicant has met the burden of proof necessary to justify the granting of a use variance. The small size of the lot and floorplate; the restricted size of the structure due to its existing configuration and landmark status; the limited utility of the structure for department store use because of problems with vertical access and visual connections between floors; the declining and changing market conditions for department stores; and the strict imposition of the regulations



limiting the use of the entire property to a single department store use combine to create an exceptional and extraordinary condition inherent in the site itself.

2. The Board finds that the applicant has demonstrated that it has been unable to attract a department store tenant for the subject site. The applicant did make reasonable efforts to find another department store user for the premises, writing to or contacting known department stores in the United States. The applicant took further reasonable steps, including the marketing efforts of brokers, and no tenant could be found to utilize the building as a department store.

3. The Board finds that the location of the subject site and the existing configuration of the structure are not conducive to providing a situation whereby the location of smaller stores adjacent to a department store in a mall-type setting pay higher rent in order to take advantage of the draw of the department store and, thereby, subsidize the rent offered by the department store use and making such use economically realistic for this site.

4. The Board finds that the applicant has not created its own hardship to be barred from obtaining variance relief. The SHOP Regulations, the predecessor regulations to the Downtown Development District, were not adopted until March 1989 and became final and effective on March 31, 1989, by Z.C. Order No. 609. At the time the applicant purchased the property in July 1988, the proposed regulations for the SHOP District, which had been published in the D.C. Register on May 20, 1988, did not contain the restriction that an existing department store could not be converted to any other use.

5. The Board has considered the physical and regulatory constraints affecting this site and has noted the timing of consideration and adoption of the regulations restricting the property to department store use. The Board finds that the historical decline of the department store market in general, and specifically in the Downtown area of the District of Columbia, most importantly including the demise of the previous occupant of the building, is not a situation under the control of the applicant.

6. The Board finds that the goals of the Downtown Development District and the Zoning Regulations for the retail core will be met by the proposed retail component in the subject building, the conditions hereinafter imposed, and the Memorandum of Understanding entered into between the applicant and the Executive Branch will insure that quality, attractor-type retail will be provided in the building.

7. The Board finds that the number of square feet devoted to retail use (a minimum of 56,460 square feet versus the minimum of

60,000 square feet required to meet the definition of the Zoning Regulations for an anchor store) is less important than the nature of the use and whether it will work to attract customers to the area. The Board notes that the applicant is not required to provide retail uses meeting the definition of an anchor store under the Regulations.

8. The Board finds that proposed restoration and reuse of the existing landmark building, at substantial cost to the applicant, would return the existing vacant and unused structure to a Class A, viable property.

9. The Board finds persuasive the applicant's argument that it is unrealistic and unreasonable to expect that a retail component of 100,000 square feet could occupy this building. The use of 100,000 square feet is an arbitrary, random and unsupported selection, bearing no relationship to the size of the building, the floorplate, or the market. A retail component occupying 100,000 square feet would extend into at least five or six levels, to the third and fourth floors above grade, which is not effective from a marketing or sales point of view. The use of the building approved in the previous BZA order was specifically tailored to and designed for the consolidation of Garfinckel's, a store which no longer exists and which can no longer occupy the building.

10. The Board finds that the plans submitted by the applicant clearly identify the area within which the retail use would be located. The applicant needs flexibility to design and allocate the space, depending upon the number of retailers and their specific needs. The Board further finds that it is not realistic to expect the applicant to have potential tenants in hand if the applicant does not have the ability to use the space for anything other than a department store.

11. The Board finds that any exterior alterations to the building will be subject to review through the historic preservation review process, which will ensure that the architectural integrity of the exterior of the building will be maintained.

12. The Board finds that the applicant's proposed anchor-type retail component in the building accomplishes substantially the same purposes in anchoring the western end of the Downtown area as did the previous Garfinckel's use.

**CONCLUSIONS OF LAW AND OPINION:**

The Board concludes that the applicant is seeking relief under Subsection 1702.4 of the Zoning Regulations. That subsection specifically provides that alternative uses for space previously occupied by a department store must be approved by the Board of

Zoning Adjustment, and states that the standards against which that application must be judged are those found in Subsection 3107.2 of the Zoning Regulations, which are applicable to variance requests.

In order to be granted a variance, the applicant must demonstrate that the subject property is affected by an extraordinary or exceptional situation or condition, that the strict application of the Zoning Regulations causes a practical difficulty or undue hardship upon the owner, and that the relief can be granted without substantial detriment to the public good and without impairing the intent, purpose and integrity of the zone plan. There is no clear legal principle to determine whether the standards for a use variance or area variance should apply to this application. The application proposes uses which are all permitted as a matter of right in the DD/C-4 District and the relief is therefore similar to an area variance. In any event, the Board concludes that the applicant has met the burden of proof for a use variance, which is the more rigorous of the variance standards.

The Board concludes that the size of the lot, the relatively small floorplate of the building, the limited total area of the building, the limitations on vertical access, the absence of a direct Metrorail connection and the adoption of the Downtown Development District regulations limiting this property to a single use, combine to create exceptional and extraordinary conditions affecting this property. The Board further concludes that the applicant's inability to find a department store tenant which would give a reasonable rate of return to the owner creates an undue hardship for the owner, in that there is no alternate use of the premises allowed. The Board concludes that the intent, purpose and integrity of the regulations are maintained because the significant specialty, attractor-type retail component which will be included in the building will accomplish the same purpose as a department store.

The Board concludes that the applicant has not created its own hardship and is therefore not disqualified from appropriately seeking variance relief. The Board notes the decision of the D.C. Court of Appeals in Clerics of Saint Viator, Inc. v. District of Columbia Board of Zoning Adjustment, 320 A.2d 291 (D.C. App. 1974). The Court ruled that an owner suffered a hardship when a building built and utilized for its intended purpose as a seminary could no longer be used for that purpose because of the extraordinary drop in enrollment of seminarians. The Court reversed the BZA's denial of the application, finding that "the historical circumstances of decline in religious vocations and departure from the traditional seminary concept of theological education" created a hardship for the owner that was not self-imposed. In the subject case, the historical and existing market conditions and circumstances affecting the decline in traditional downtown department stores has

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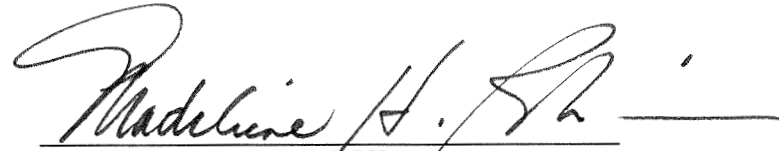
made it impossible to find another user for the building which strictly complies with the Zoning Regulations. In addition, the regulations applicable at the time of the applicant's purchase of the building permitted matter of right substitution of retail uses and change to office use as a special exception with BZA approval, as was previously approved by this Board.

The Board concludes that it has accorded to Advisory Neighborhood Commissions 2F and 2A the "great weight" to which they are entitled under the statute. It is therefore hereby **ORDERED** that this application is **GRANTED**, **SUBJECT** to the **CONDITION** that the building shall contain a minimum of the equivalent of 2.0 FAR or 56,460 square feet devoted to retail, service, arts and entertainment uses as set forth in 11 DCMR 1710 and 1711, subject to the provisions of 11 DCMR 1702.1(a) and (b). The retail service, arts and entertainment uses shall be located on at least three levels of the building, including the first floor and other adjacent levels as may be required to meet the minimum floor area ratio requirement of 2.0 or 56,460 square feet.

VOTE: 3-0 (Maybelle Taylor Bennett, Angel F. Clarens and Paula L. Jewell to grant; Sheri M. Pruitt and Carrie L. Thornhill not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:

  
MADELIENE H. ROBINSON  
Director

FINAL DATE OF ORDER:

OCT 28 1993

PURSUANT TO D.C. CODE SEC. 1-2531 (1987), SECTION 267 OF D.C. LAW 2-38, THE HUMAN RIGHTS ACT OF 1977, THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF D.C. LAW 2-38, AS AMENDED, CODIFIED AS D.C. CODE, TITLE 1, CHAPTER 25 (1987), AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. THE FAILURE OR REFUSAL OF APPLICANT TO COMPLY WITH ANY PROVISIONS OF D.C. LAW 2-38, AS AMENDED, SHALL BE A PROPER BASIS FOR THE REVOCATION OF THIS ORDER.

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UNDER 11 DCMR 3103.1, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."

THIS ORDER OF THE BOARD IS VALID FOR A PERIOD OF SIX MONTHS, UNLESS WITHIN SUCH PERIOD AN APPLICATION FOR A BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY IS FILED WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS.

15822ord/ss/LJP

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
BOARD OF ZONING ADJUSTMENT



BZA APPLICATION NO. 15822

As Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that on OCT 28 1993 a copy of the order entered on that date in this matter was mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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Downtown Cluster of Congregations  
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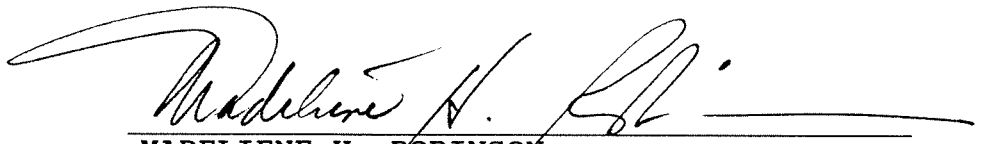
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\_\_\_\_\_  
MADELIENE H. ROBINSON  
Director

DATE: OCT 28 1993

att15822/kjw/bhs